

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

MYRA BROWN and ALEXANDER  
TAYLOR,

Plaintiffs,

v.

U.S. DEPARTMENT OF EDUCATION and  
MIGUEL CARDONA, in his official capacity as  
Secretary of Education,

Defendants.

Civil Action No. 4:22-cv-00908-P

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR  
MOTION TO STAY JUDGMENT PENDING APPEAL**

## TABLE OF CONTENTS

INTRODUCTION.....	1
ARGUMENT.....	1
I. Defendants Are Likely To Succeed on Appeal.....	2
A. The Court Lacks Subject-Matter Jurisdiction.....	3
B. The Court’s Rulings on the Merits Were Erroneous. ....	5
1. The Court Erred by Entering Final Judgment on a Claim Plaintiffs Did Not Plead. ....	6
2. Defendants Have Shown that the Loan-Discharge Program Is Authorized by the HEROES Act, Presenting a Serious Legal Question on Appeal.....	8
C. The Court Erred by Entering Final Judgment on an Incomplete Record.....	14
II. The Balance of Equities Overwhelmingly Favors a Stay Pending Appeal. ....	17
III. At a Minimum, the Judgment Should Be Narrowed .....	19
CONCLUSION.....	20

## TABLE OF AUTHORITIES

### CASES

<i>Ala. Ass’n of Realtors v. Dep’t of Health &amp; Hum. Servs.</i> , 141 S. Ct. 2485 (2021) .....	13
<i>Anderson v. Davila</i> , 125 F.3d 148 (3d Cir. 1997) .....	14, 15
<i>Arizona v. Biden</i> , 31 F.4th 469 (6th Cir. 2022) .....	19
<i>Arnold v. Garlock, Inc.</i> , 278 F.3d 426 (5th Cir. 2001) .....	2, 6
<i>Biden v. Missouri</i> , 142 S. Ct. 647 (2022) .....	10, 11
<i>Bye v. MGM Resorts Int’l, Inc.</i> , 49 F.4th 918 (5th Cir. 2022) .....	6, 7
<i>California v. Texas</i> , 141 S. Ct. 2104 (2021) .....	4
<i>Citizens to Pres. Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971) .....	16
<i>Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.</i> , 447 U.S. 102 (1980) .....	14
<i>Dep’t of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm’n</i> , 760 F.3d 427 (5th Cir. 2014) .....	4
<i>DHS v. New York</i> , 140 S. Ct. 599 (2020) .....	19
<i>FDA v. Brown &amp; Williamson Tobacco Corp.</i> , 529 U.S. 120 (2000) .....	13
<i>Geddes v. Weber Cnty.</i> , No. 20-4083, 2022 WL 3371010 (10th Cir. Aug. 16, 2022) .....	7
<i>Georgia v. President of the United States</i> , 46 F.4th 1283 (11th Cir. 2022) .....	13, 19
<i>Gill v. Whitford</i> , 138 S. Ct. 1916 (2018) .....	19

<i>Golden Gate Rest. Ass’n v. City &amp; Cnty. of San Francisco</i> , 512 F.3d 1112 (9th Cir. 2008) .....	17
<i>Hecht Co. v. Bowles</i> , 321 U.S. 321 (1944) .....	19
<i>Henderson v. Stalder</i> , 287 F.3d 374 (5th Cir. 2002) .....	5
<i>Hilton v. Braunskill</i> , 481 U.S. 770 (1987) .....	1
<i>Hunt v. Cromartie</i> , 526 U.S. 541 (1999) .....	16
<i>Intell. Ventures II LLC v. BITCO Gen. Ins. Corp.</i> , No. 6:15-cv-59, 2015 WL 11616297 (E.D. Tex. Sept. 14, 2015) .....	15
<i>Kentucky v. Biden</i> , 23 F.4th 585 (6th Cir. 2022) .....	13
<i>Little Sisters of the Poor Saints Peter &amp; Paul Home v. Pennsylvania</i> , 140 S. Ct. 2367 (2020) .....	6
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992) .....	15
<i>Madsen v. Women’s Health Ctr., Inc.</i> , 512 U.S. 753 (1994) .....	19
<i>Monsanto Co. v. Geertson Seed Farms</i> , 561 U.S. 139 (2010) .....	3
<i>Nat’l Ass’n of Mfrs. v. Dep’t of Def.</i> , 138 S. Ct. 617 (2018) .....	12
<i>Nken v. Holder</i> , 556 U.S. 418 (2009) .....	2
<i>Paris v. U.S. Dep’t of Hous. &amp; Urb. Dev.</i> , 713 F.2d 1341 (7th Cir. 1983) .....	16
<i>Park v. Direct Energy GP, LLC</i> , 832 F. App’x 288 (5th Cir. 2020) .....	6
<i>Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott</i> , 734 F.3d 406 (5th Cir. 2013) .....	1

<i>Pughsley v. 3750 Lake Shore Drive Coop. Bldg.</i> , 463 F.2d 1055 (7th Cir. 1972) .....	14
<i>Richmond Med. Ctr. for Women v. Herring</i> , 570 F.3d 165 (4th Cir. 2009) .....	8
<i>Salazar v. Buono</i> , 559 U.S. 700 (2010) .....	5, 8
<i>Scenic Am., Inc. v. U.S. Dep’t of Transp.</i> , 836 F.3d 42 (D.C. Cir. 2016) .....	16
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016) .....	5
<i>Summers v. Earth Island Inst.</i> , 555 U.S. 488 (2009) .....	5, 16
<i>Tex. Disposal Sys., Inc. v. FCCI Ins. Co.</i> , 854 F. App’x 576 (5th Cir. 2021) .....	7
<i>Texas v. United States</i> , 14 F.4th 332 (5th Cir. 2021), <i>opinion vacated on reh’g en banc</i> , 24 F.4th 407 (5th Cir. 2021) .....	17
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021) .....	3
<i>United States v. Gonzales</i> , 520 U.S. 1 (1997) .....	9
<i>United States v. Sineneng-Smith</i> , 140 S. Ct. 1575 (2020) .....	6, 8
<i>Univ. of Texas v. Camenisch</i> , 451 U.S. 390 (1981) .....	14
<i>Valentine v. Collier</i> , 956 F.3d 797 (5th Cir. 2020) .....	17
<i>Van Buren v. United States</i> , 141 S. Ct. 1648 (2021) .....	11
<i>West Virginia v. EPA</i> , 142 S. Ct. 2587 (2022) .....	12, 13
<i>Wyoming v. U.S. Dep’t of Interior</i> , No. 2:15-cv-041-SWS, 2015 WL 9463708 (D. Wyo. Dec. 17, 2015) .....	15

## STATUTES

20 U.S.C. § 1082.....	13
20 U.S.C. § 1098bb .....	9, 10
20 U.S.C. § 1098ee .....	11
42 U.S.C. § 1395x.....	10

## FEDERAL RULES

Fed. R. Civ. P. 56 .....	16
Fed. R. Civ. P. 65 .....	14

## ADMINISTRATIVE & EXECUTIVE MATERIALS

Federal Student Aid Programs, 77 Fed. Reg. 59,311 (Sept. 27, 2012).....	10
Federal Student Aid Programs, 85 Fed. Reg. 79,856 (Dec. 11, 2020) .....	10, 11
Federal Student Aid Programs, 87 Fed. Reg. 61,512 (Oct. 12, 2022).....	9

## LEGISLATIVE MATERIALS

149 Cong. Rec. H2524 (daily ed. Apr. 1, 2003) .....	9
153 Cong. Rec. H10789 (daily ed. Sept. 25, 2007) .....	9
Federal Student Loan Integrity Act, H.R. 7058, 117th Cong. (Mar. 11, 2022) .....	14
Stop Reckless Student Loan Actions Act of 2022, S. 4094, 117th Cong. (Apr. 27, 2022).....	14
Stop Reckless Student Loan Actions Act of 2022, H.R. 7656, 117th Cong. (May 3, 2022) .....	14

## OTHER AUTHORITIES

FSA, <i>Student Loan Delinquency and Default</i> , <a href="https://perma.cc/9RJ7-SXR2">https://perma.cc/9RJ7-SXR2</a> .....	17
<i>Webster's Third New International Dictionary</i> 97 (1976).....	9

## INTRODUCTION

Defendants respectfully request a stay pending appeal of the Court's November 10, 2022 order entering summary judgment for Plaintiffs and vacating the Department of Education's program for providing targeted student-loan debt relief to individuals affected by the COVID-19 pandemic. *See* Order, ECF No. 37 (as amended Nov. 14, 2022); Final Judgment, ECF No. 38. As explained below, Defendants are likely to succeed in their appeal because the Court lacked subject-matter jurisdiction to enter an order that provides no legal redress to Plaintiffs, blocks millions of Americans from receiving debt relief, and rests on a claim that Plaintiffs did not even assert. The Court's analysis of a substantive claim that it advanced in place of the procedural claim that Plaintiffs pleaded was similarly improper and flawed. And for many similar reasons, the balance of equities weighs heavily against the Court's injunction, and Defendants face irreparable harm from the delay of loan relief that is necessary to guard against student-loan borrowers becoming worse off with respect to their student loans as a result of COVID-19. Plaintiffs' parochial interests in this case cannot outweigh the interests of the millions of borrowers who will suffer harm from the delay in relief.

Defendants respectfully request that the Court rule on this motion no later than Thursday, November 17, at 12:00 PM Central Time. Given the broad impact of the Court's judgment, if the Court does not grant relief by that time, Defendants will seek relief from the U.S. Court of Appeals for the Fifth Circuit.

## ARGUMENT

Courts consider four factors in assessing a motion for stay pending appeal: (1) the movant's likelihood of prevailing on the merits of the appeal, (2) whether the movant will suffer irreparable harm absent a stay, (3) the harm that other parties will suffer if a stay is granted, and (4) the public interest. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 410 (5th Cir. 2013). When the government is a party, its interests

and the public interest “merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009). A court that has found for one party on the merits is not required to reverse that position in order to grant a stay to the opposing party. Instead, when “a serious legal question is involved” and “the balance of the equities weighs heavily in favor of granting the stay,” a party seeking a stay pending appeal “need only present a substantial case on the merits.” *Arnold v. Garlock, Inc.*, 278 F.3d 426, 438–39 (5th Cir. 2001) (citation omitted). Here, each of these factors weighs heavily in favor of a stay pending appellate review.

### **I. Defendants Are Likely To Succeed on Appeal.**

In issuing its judgment of vacatur, the Court determined that Plaintiffs had sufficiently established standing in relation to alleged *procedural* violations of the Administrative Procedure Act (“APA”), but it rejected Plaintiffs’ procedural claim on the merits and held that “the Program did not violate the APA’s procedural requirements.” Order at 18. That should have been the end of the Court’s inquiry. But the Court proceeded to grant summary judgment based on purported *substantive* violations of the APA—specifically on the ground that Defendants’ loan-discharge program was not authorized by the HEROES Act—even though Plaintiffs’ complaint did not request relief based on any such substantive violations, and even though the Court never determined that Plaintiffs had standing to pursue such a claim.

Defendants are likely to prevail on appeal because the Court’s determination that Plaintiffs have standing based on an alleged procedural violation (unaccompanied by any concrete harm) was erroneous. But even if Plaintiffs had standing to pursue their procedural claim, that could not entitle them to relief because—as the Court correctly concluded—that procedural claim is meritless. And the Court improperly granted relief based on a theory that Plaintiffs indisputably lack standing to pursue and did not even plead. Even putting all that aside, Defendants are likely to succeed because the plain text of the HEROES Act authorizes the loan-discharge program, and the Court improperly applied the major questions doctrine to reach a different result.

**A. The Court Lacks Subject-Matter Jurisdiction.**

As a threshold matter, Plaintiffs lack standing to challenge the loan forgiveness plan because they have suffered no injury-in-fact. Plaintiffs must demonstrate that the challenged action causes them to suffer an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). Standing is essential because federal courts do not “possess a roving commission to publicly opine on every legal question” and do not “exercise general legal oversight of the Legislative and Executive Branches.” *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

Here, the Court based its standing analysis on Plaintiffs’ assertion that they had been “depriv[ed] of their procedural right under the APA to provide meaningful input on any proposal from the Department to forgive student-loan debt.” Order at 11; *see also id.* at 12 (stating that Plaintiffs’ “injury” is “that they personally did not receive forgiveness and were denied a procedural right to comment on the Program’s eligibility requirements”). It thus determined that Plaintiffs had standing to pursue their claim that the Department violated the APA’s procedural requirements by promulgating the challenged policy without engaging in notice-and-comment. But the Court’s summary judgment decision was based on a different, unpleaded, claim—that the Secretary’s decision exceeds his authority under the HEROES Act—and the Court did not find that Plaintiffs have standing to assert that claim. “[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages).” *Ramirez*, 141 S. Ct. at 2208. Here, Plaintiffs’ complaint asserted only one count: a violation of notice and comment rulemaking. Compl. ¶¶ 62–73. Plaintiffs did not even attempt to argue they would have standing to pursue a hypothetical separate claim that the loan forgiveness plan exceeded the Secretary’s statutory authority, and the Court erred in granting relief on a claim without determining whether Plaintiffs had standing to raise it. And indeed, Plaintiffs would

not have standing to bring a claim of a substantive violation because they cannot show any injury-in-fact traceable to the Department's decision and redressable by a favorable decision from this Court. *See* Defs.' Opp'n to Pls.' Mot. for Prelim. Inj. & Mot. to Dismiss at 8–12, ECF No. 24 ("PI Opp'n").

On redressability, in particular, the Court reasoned that a "lighter standard applies" when a plaintiff asserts a procedural violation. Order at 14. But the excess-of-statutory-authority claim that the Court actually ruled on does not arise "in the context of procedural injuries." *Id.* Plaintiffs thus have to make the "normal[]" showing that "a favorable ruling would redress [their] entire injury at [the] hands of the defendant," *id.*—*i.e.*, that it is "likely, as opposed to merely speculative, that a favorable decision will redress the plaintiff's injury." *Dep't of Tex., Veterans of Foreign Wars of U.S. v. Tex. Lottery Comm'n*, 760 F.3d 427, 432 (5th Cir. 2014) (citation omitted).

Because Plaintiffs have made no such showing, there is a telling disconnect between the Court's redressability analysis and the remedy that it granted. *See California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (redressability "consider[s] the relationship between 'the judicial relief requested' and the 'injury' suffered"). The Court reasoned that Plaintiffs' alleged procedural injury—the lack of an opportunity to comment on the loan forgiveness program—was redressable because "there is at least some possibility that Defendants would reconsider the eligibility requirements of the Program if it were enjoined or vacated." Order at 14. But the Court's remedy—declaring that the Secretary exceeded his statutory authority and vacating the student loan forgiveness plan on a universal basis—leaves Plaintiffs' injuries unresolved: Neither Plaintiff will have any additional opportunity to comment on the loan forgiveness program because the Court now has rendered such a program legally unavailable. At best, Plaintiffs are thus left in the same position as before this case, without any additional opportunity to comment and with Plaintiff Brown holding the same amount of debt as she did at the outset of this litigation. But in truth, the Court's remedy actually inflicts a new injury on Plaintiff Taylor, who will now owe \$10,000 *more* in student loan debt than he would have owed in the

absence of the Court's order. The Court's failure to "find prospective relief that fits the remedy to the wrong or injury that has been established," *Salazar v. Buono*, 559 U.S. 700, 718 (2010), evinces Plaintiffs' lack of standing to raise the merits claim for which the Court granted relief.

The actual standing analysis that the Court conducted was also flawed. To start, as the Court correctly held, "the Secretary may waive or modify any provision without notice and comment under the HEROES Act." Order at 18. As a matter of standing, then, Plaintiffs have no procedural right "granted by statute" to notice and comment or negotiated rulemaking, *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016), and Plaintiffs have not suffered any injury, procedural or otherwise, from the Secretary's alleged failure to undertake processes he was under no legal requirement to utilize. Moreover, as explained in Defendants' briefing, the "deprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing," *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009), and Plaintiffs have no concrete interest in whether "a benefit has been [unlawfully] granted to others." *Henderson v. Stalder*, 287 F.3d 374, 384 (5th Cir. 2002) (Jones, J., concurring); *see* PI Opp'n at 9-11.

Nor is the claimed procedural injury redressable by a Court order. Given the Court's conclusion that the Department's loan discharge policy was legally unauthorized because it is "one of the largest exercises of legislative power without congressional authority in the history of the United States," Order at 25, the Department could hardly afford Plaintiffs relief after notice and comment by *expanding* the program to cover additional categories of student loan borrowers (including Plaintiffs, who argue simultaneously in this very lawsuit that the relief the Secretary determined to provide is too broad and yet that the Secretary should have included them in that relief).

## **B. The Court's Rulings on the Merits Were Erroneous.**

Defendants are also likely to succeed on appeal because the Court erred in finding a lack of clear congressional authorization for the loan-discharge program. Two key errors infect the Court's

reasoning on the merits. First, to reach its decision, the Court deviated from the “principle of party presentation” by considering and ruling on a claim that was not pleaded by Plaintiffs. *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). And second, the Court improperly applied the major questions doctrine to “impos[e] limits on an agency’s discretion that are not supported by the text.” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). Defendants have at least raised a “substantial” question as to both errors, *Arnold*, 278 F.3d at 438–39, and while Defendants’ likelihood of success on either issue would independently support a stay, taken together, the case for a stay is substantial.

**1. The Court Erred by Entering Final Judgment on a Claim Plaintiffs Did Not Plead.**

The Fifth Circuit has repeatedly (and recently) emphasized that “[a] claim which is not raised in the complaint but, rather, is raised only” in summary judgment proceedings “is not properly before the court.” *Bye v. MGM Resorts Int’l, Inc.*, 49 F.4th 918, 925 (5th Cir. 2022) (citation omitted); *see also Park v. Direct Energy GP, LLC*, 832 F. App’x 288, 295 (5th Cir. 2020). That rule reflects a key feature of “our adversarial system of adjudication,” namely that courts must “rely on the parties to frame the issues for decision” and remain “essentially passive instruments of government.” *Sineneng-Smith*, 140 S. Ct. at 1579 (citations omitted). Here, the Court violated that “principle of party presentation,” *id.*, by improperly contorting Plaintiffs’ claim on the merits from one of proper procedure to one of adequate statutory authority. *See* Order at 18–23.

From its outset, this case concerned a single claim for relief: a request that the loan-discharge program “be held unlawful and set aside” because it “did not go through the proper procedures.” *See* Compl. ¶ 73; *see also id.* at 13 (labeling this claim as one for “Failure to Follow Proper Rulemaking Procedures” in violation of the APA). In unmistakable terms, this Court rejected that claim: As the Court put it, “because the [loan-discharge program] was issued under the HEROES Act, which exempts notice and comment, the Program did not violate the APA’s procedural requirements.”

Order at 18. The Court’s merits analysis should have ended there, “within the confines of the issue as the parties [had] presented it.” *Tex. Disposal Sys., Inc. v. FCCI Ins. Co.*, 854 F. App’x 576, 579 n.6 (5th Cir. 2021).

Nevertheless, after rejecting Plaintiffs’ procedural arguments, the Court went on to address the “APA’s Substantive Requirements.” Order at 18. It did so because, notwithstanding the exclusively procedural nature of Plaintiffs’ lone claim, the Court construed the complaint to have sought relief on a second basis: “that the Secretary lacks the authority to implement the Program under the HEROES Act.” *Id.* at 6. But the pages of the complaint that Court identified as advancing this second basis for relief, *see id.* (citing Compl. at 4–5), concern only the identity of the parties, the basis for jurisdiction and venue, and “background” regarding the Department of Education’s grant and loan programs and certain statutes governing compromises of student loan debt. Indeed, rather than appearing in the complaint, arguments about the major questions doctrine and the Secretary’s authority to forgive student loan debt under the HEROES Act were first introduced into this case through Plaintiffs’ motion for a preliminary injunction, which the Court later converted into a motion for summary judgment.

By granting relief based on a claim that was raised only by motion and which substantially differed from the claim pleaded in the complaint, the Court violated the rule against consideration of unpleaded claims. *See Bye*, 49 F.4th at 925; *accord Geddes v. Weber Cnty.*, No. 20-4083, 2022 WL 3371010, at \*11 (10th Cir. Aug. 16, 2022) (discussing “a paradigmatic example of when it would be *inappropriate* to allow a plaintiff to advance a new theory not pleaded in his complaint”). That this led the Court to grant a form of relief—vacatur of the Department’s policy as unauthorized by statute—that precludes the relief Plaintiffs requested in their complaint—an opportunity to provide comments on a future, hopefully expanded, loan-discharge program—shows just how grave this error was. *See Salazar*, 559 U.S. at 718 (“A court must find prospective relief that fits the remedy to the wrong or injury that has

been established.”); *cf. Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir. 2009) (Article III’s limitation prevents federal courts from opining on “issues not before the court”).

The procedural focus of Plaintiffs’ claim was not ambiguous. The complaint extolled, prominently and at length, the virtues of the APA’s notice-and-comment requirements. *See, e.g.*, Compl. ¶ 1. Plaintiffs’ entire claim to standing was based on an alleged deprivation of their “procedural right” to comment on the Department’s policy, and Plaintiffs bemoaned that “the Department hammered out the critical details of the [loan-discharge program] in secret,” *id.* ¶ 5, without providing them with “an opportunity to present their views . . . and to provide additional comments on any proposal . . . to forgive student loan debts,” *id.* ¶ 10. Nowhere did the complaint refer to the APA’s substantive requirements, allege that the Secretary lacked statutory authority to forgive the student loan debts at issue in this lawsuit, or mention the major questions doctrine and the clear congressional authorization that that doctrine sometimes requires in extraordinary cases. Yet these issues were the focus of the Court’s merits analysis, and they provide the only basis for the Court’s grant of summary judgment to Plaintiffs. Because that “radical transformation” of this case was unjustified, *Sineneng-Smith*, 140 S. Ct. at 1582, it is likely to be undone on appeal.

## **2. Defendants Have Shown that the Loan-Discharge Program Is Authorized by the HEROES Act, Presenting a Serious Legal Question on Appeal.**

Even assuming that Plaintiffs had properly asserted a substantive challenge to the Secretary’s statutory authority to implement the loan-discharge program, Defendants’ appeal is likely to succeed because the program is authorized by the plain text of the HEROES Act. Although the Court purported to apply the major questions doctrine to require a statement of “clear congressional authorization to create a \$400 billion student loan forgiveness program,” Order at 1, its major-questions analysis is fundamentally flawed, and no clearer authorization than that already contained in the HEROES Act is required.

In the HEROES Act, Congress gave the Secretary broad authority to “waive or modify *any* statutory or regulatory provision applicable to” federal student loan programs in response to a national emergency, “[n]otwithstanding any other provision of law” unless otherwise specified. 20 U.S.C. § 1098bb(a)(1) (emphasis added). That authority extends as far as “necessary to ensure that” borrowers affected by the relevant national emergency are not left “in a worse position financially with respect to their student loans because of” it. *Id.* § 1098bb(a)(2). Congress knew that the Secretary’s exercise of this authority necessarily would vary in scope as necessary to respond to national emergencies, which could differ substantially in gravity and duration. *See, e.g.*, 149 Cong. Rec. H2524 (Apr. 1, 2003) (statement of Rep. Kline) (“By granting flexibility to the Secretary of Education, the HEROES Act will . . . provide the Secretary with the authority to address issues not yet foreseen.”); 153 Cong. Rec. H10789 (Sept. 25, 2007) (statement of Rep. Sestak) (“Because of unforeseen national emergencies, such as Hurricane Katrina, as well as our continued military engagement overseas, it is important that we pass the legislation before us and allow the Secretary of Education to continue providing this needed relief.”). And in appropriate circumstances, that grant of authority naturally may license the discharge of borrowers’ loan obligations altogether, rather than the mere deferral of them. *See United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” (quoting *Webster’s Third New International Dictionary* 97 (1976))); *see also* 20 U.S.C. § 1098bb(a)(1) (providing that relevant statutory and regulatory provisions may be waived or modified “unless enacted with specific reference to this section”); 2022 Notice, 87 Fed. Reg. 61,512, 61,514 (Oct. 12, 2022) (modifying certain provisions governing the discharge of student loan debts and the procedures for obtaining such discharges, as those provisions do not contain any cross-reference to 20 U.S.C. § 1098bb).

For all the reasons that Defendants have already given, *see* PI Opp’n at 14–22, and which Defendants hereby incorporate by reference, the loan-discharge program falls well within the text and

purposes of the HEROES Act. The Court disagreed because it thought Congress “would have mentioned loan forgiveness” if it had intended to make such relief available by statute. Order at 21. But the same could be said for many other forms of relief that the Secretary has provided to borrowers even though they are not mentioned expressly in the HEROES Act, including deferrals of borrowers’ repayment obligations, *see* 2020 Notice, 85 Fed. Reg. 79,856, 79,857 (Dec. 11, 2020), and the waiver of students’ obligations to repay certain overpayments, *see* 2012 Notice, 77 Fed. Reg. 59,311, 59,313 (Sept. 27, 2012). Rather than dictate a list of every conceivable form of relief that might be appropriate in a given emergency—and recognizing that major emergencies tend to be unanticipated and difficult to plan for—Congress opted here to provide a more flexible grant of authority to be defined by the nature of the emergency and the harms anticipated to be suffered by affected borrowers. 20 U.S.C. § 1098bb(a)(2). Given the acknowledged severity of the ongoing COVID-19 pandemic, and the financial difficulties that many borrowers will face when payments ultimately resume, the loan-discharge program “fits neatly within the language of the statute,” and no more definite statement is required. *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (approving vaccination requirement, over major questions objection, issued under a statute that “authorized the Secretary [of HHS] to impose conditions on the receipt of Medicaid and Medicare funds that ‘the Secretary finds necessary in the interest of the health and safety of individuals who are furnished services.’” (quoting 42 U.S.C. § 1395x(e)(9))). And, of course, Congress did expressly authorize the Secretary to “waive” or “modify” provisions that oblige students to repay their student loans—the semantics of calling such waivers and modifications “loan forgiveness” does not take the Secretary’s action beyond the legitimate scope of the statutory text.

The Court also questioned, without answering, whether “COVID-19 is still a ‘national emergency’ under the Act.” Order at 22. But the Act is explicit and unambiguous: A “national emergency” exists when declared by the President of the United States. 20 U.S.C. § 1098ee(4). And

“[w]hen a statute includes an explicit definition of a term, [courts] must follow that definition.” *Van Buren v. United States*, 141 S. Ct. 1648, 1657 (2021) (citation omitted). Because the declaration of the COVID-19 pandemic as a national emergency remains in effect, and indeed, was recently renewed, *see Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic*, 87 Fed. Reg. 10,289 (Feb. 18, 2022), the Court’s reliance on informal, extra-record assessments of the present severity of the pandemic was improper.<sup>1</sup> Just as the Secretary may provide relief to affected borrowers even after a hurricane stops spinning, so may the Secretary provide appropriate relief to borrowers now to ensure that they are not made worse off by the pandemic.

Finally, the Court claimed to find clear congressional authorization for the loan-discharge program lacking because such a program has not been implemented in the recent past. Order at 23. Yet the Court failed to acknowledge that the scope of the Secretary’s authority under the HEROES Act may vary in proportion to the scale of the emergency and harms involved. Thus, even though the Secretary had never before paused payments for all student loan borrowers under the Act, implementing such a pause was the first action the Secretary took in response to the pandemic. 2020 Notice, 85 Fed. Reg. at 79, 857. If that pause and the subsequent loan-discharge program are broader in scope than pre-pandemic grants of relief under the HEROES Act, that difference simply reflects the vastly greater scope of the current national emergency and the economic devastation it has wrought, not any outer bound on the Secretary’s authority. *See Missouri*, 142 S. Ct. at 653 (upholding agency action that went “further than what the Secretary has done in the past” to achieve a statutory

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<sup>1</sup> Citing a *60 Minutes* tweet, the Court noted the President has publicly acknowledged that pandemic conditions are easing. Order at 22 n.20. But that easing will not erase the significant economic and personal harms that many have suffered over the last two and a half years. And continued easing is hardly a certainty, as the recent extension of the public health emergency shows. *See* Xavier Becerra, *Renewal of Determination That a Public Health Emergency Exists*, <https://perma.cc/DXD8-SUD2> (Oct. 13, 2022).

objective, in part because the agency “never had to address an infection problem of [the] scale and scope [of COVID-19] before”).

The Court’s analysis of the Secretary’s statutory authority should have “beg[un] with the statutory text”—and, because the text is clear, “end[ed] there as well.” *Nat’l Ass’n of Mfrs. v. Dep’t of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted). But instead, the Court reached to apply the major-questions doctrine on the sole grounds that this case implicates “billions of dollars” and recently introduced draft bills on the topic have failed. Order at 19 (citation omitted); *see also id.* at 20.

Even if the major questions doctrine applied, the Court’s application of that doctrine here is likely to be overturned on appeal. For one thing, the Court failed to grapple with the reasons underlying the Secretary’s determination that the loan forgiveness program is necessary to prevent certain borrowers from being made worse off with respect to their student loans as a result of the pandemic, focusing instead solely on the suggestion that the pandemic is over. *See* Order at 22. In failing to address the Secretary’s reasoning, the Court overlooked the close tie between the Secretary’s action here and the statutory standards that authorized him to act.

The Court also failed to address substantial arguments raised by Defendants that this case is not a “major questions case.” *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022). In prior major-questions cases, the Supreme Court has sometimes considered whether the challenged action is within the agency’s traditional field of expertise in determining whether the major questions doctrine applies. *See id.* at 2612–13 (“When [an] agency has no comparative expertise in making certain policy judgments, we have said, Congress presumably would not task it with doing so.” (citation omitted)). But here, the Secretary of Education is indisputably in the business of administering the federal student financial aid programs and, in myriad circumstances, providing appropriate relief from federal student loan repayment obligations. And given the Secretary’s fundamental legal power to “compromise, waive, or release any right, title, claim, lien, or demand” acquired in the Secretary’s performance of his

vested “functions, powers, and duties” to administer federal student loans, 20 U.S.C. § 1082(a)(6), this case is unlike those where an agency has accreted to itself an entirely unexpected power. *Cf. Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (“The moratorium intrudes into an area that is the particular domain of state law: the landlord-tenant relationship.”); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000) (“Congress . . . has . . . squarely rejected proposals to give the FDA jurisdiction over tobacco[.]”).

Similarly, no major questions case considered by the Supreme Court has, to date, involved the disbursement of a federal benefit to private parties; instead, those cases have concerned the imposition of significant burdens on private parties. *See, e.g., Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (regulating landlords across at least 80% of the country). And although the Court declared this distinction to be “untrue,” the circuit-level decisions that it cited—*Kentucky v. Biden*, 23 F.4th 585 (6th Cir. 2022) and *Georgia v. President of the United States*, 46 F.4th 1283 (11th Cir. 2022)—bear out the difference all the same, as they concerned a vaccination requirement imposed on private businesses and employees as a condition of eligibility to compete for and receive government contracts—not a “vaccine mandate for federal employees,” *contra* Order at 21, and not the provision of a statutory benefits pursuant to a program that an executive branch agency has been given clear congressional authorization to administer.

Finally, the Court applied the major questions doctrine despite the fact that there is nothing “cryptic,” *Brown & Williamson*, 529 U.S. at 160, or “ancillary,” *West Virginia*, 142 S. Ct. at 2602, about the HEROES Act’s central provisions. In granting the Secretary wide discretion to waive or modify provisions of the legal regime governing federal student loan programs, Congress did not “use oblique or elliptical language,” nor provide a potentially broad delegation “through ‘modest words,’ ‘vague terms,’ or ‘subtle device[s].’” *West Virginia*, 142 S. Ct. at 2609 (citation omitted). Indeed, it would have been hard for Congress to more clearly authorize the Secretary, during a national emergency, to

exercise maximum flexibility in crafting appropriate relief for student loan borrowers facing extraordinary and unforeseen circumstances.<sup>2</sup>

**C. The Court Erred by Entering Final Judgment on an Incomplete Record.**

At the very least, Defendants are likely to succeed in showing that the Court’s decision to advance this case to final judgment was premature. While a court “may advance the trial on the merits and consolidate it with” the preliminary injunction hearing, Fed. R. Civ. P. 65(a)(2), doing so is proper only after “clear and unambiguous notice of the court’s intent to consolidate” provided “at a time which will still afford the parties a full opportunity to present their respective cases,” *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (quoting *Pughsley v. 3750 Lake Shore Drive Coop. Bldg.*, 463 F.2d 1055, 1057 (7th Cir. 1972) (Stevens, J.)). That opportunity was not afforded to Defendants here.

For one thing, the Court’s notice of its intent to consolidate the proceedings pursuant to Rule 65(a)(2) came too late. By first providing notice that it was considering consolidation on November 2, more than a week after holding the hearing on Plaintiffs’ motion for a preliminary injunction, the Court did not “state its intention to treat the hearing as a trial on the merits until after all testimony had been taken and all evidence had been submitted.” *Anderson v. Davila*, 125 F.3d 148, 158 (3d Cir.

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<sup>2</sup> The Court also noted the failure of various legislative proposals involving loan forgiveness in support of its major questions analysis. Order at 20. But the failure of those bills, which would have offered different relief, to different groups of borrowers, and for different reasons than the Secretary has articulated, says nothing about whether the Secretary’s action here was authorized under the HEROES Act. *See, e.g., Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (recognizing that “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one”(citation omitted)). It is also true that Congress has failed to amend the HEROES Act so as to prevent loan discharges—though the Court did not appear to find that relevant to its analysis—and so recent legislative history would seem to cut both ways at best. *See, e.g.,* S. 4094, 117th Cong. § 4(d)(1) (introduced Apr. 27, 2022) (proposing to amend the HEROES Act to specify that “[n]otwithstanding any other provisions of law, the President or the Secretary of Education may not cancel the outstanding balances, or a portion of the balances, on covered loans due to the COVID-19 national emergency or any other national emergency”); H.R. 7656, 117th Cong. § 4(d)(1) (introduced May 3, 2022) (same); *see also* H.R. 7058, 117th Cong. (introduced Mar. 11, 2022) (proposing to prohibit further waivers or modifications in connection with the COVID-19 pandemic).

1997). Even then, the Court gave Defendants just two days to object. Thus, the Court improperly restricted Defendants to defenses prepared for a “more limited purpose” at the preliminary injunction stage and “on the basis of procedures that are less formal and evidence that is less complete.” *Wyoming v. U.S. Dep’t of Interior*, No. 2:15-cv-041-SWS, 2015 WL 9463708, at \*2 (D. Wyo. Dec. 17, 2015) (citation omitted).

For this reason, there has been no adversarial testing of Plaintiffs’ standing allegations. *See* ECF No. 35, at 2–3. In support of their preliminary injunction motion, Plaintiffs asserted through sworn declarations that they believe their “student loan debt should be forgiven too,” Pls.’ App. at 2, 5, and that they “want an opportunity to present [their] views to the Department and provide additional comments on any proposal from the Department to forgive student loan debts,” *id.* at 2, 5. There is good reason to doubt those assertions, as Plaintiffs simultaneously argued for, and this Court ultimately granted, an order precluding the forgiveness of student loan debt altogether. Yet Plaintiffs did not present themselves at the preliminary injunction hearing, so those threadbare assertions have gone untested, without so much as a credibility determination from this Court. *Cf. Intell. Ventures II LLC v. BITCO Gen. Ins. Corp.*, No. 6:15-cv-59, 2015 WL 11616297, at \*2 (E.D. Tex. Sept. 14, 2015) (noting the need to “judge the credibility and the proper weight, if any, to be given to . . . the statements of a declarant”). Moreover, Defendants had no notice that the preliminary injunction hearing would be their final opportunity to challenge Plaintiffs’ allegations. *See Anderson*, 125 F.3d at 158. Under those circumstances, consolidation pursuant to Rule 65(a)(2) was improper.

In concluding otherwise, the Court reasoned that “Plaintiffs’ intent to participate in any comment process and the substance of their comments” were “not material to standing or the merits . . . even if resolved in Defendants’ favor.” Order at 9. But that is incorrect. At summary judgment, “the plaintiff can no longer rely on such ‘mere allegations,’ but must ‘set forth’ by affidavit or other evidence ‘specific facts’” to establish standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)

(quoting Fed. R. Civ. P. 56(e)), and “all justifiable inferences are to be drawn in [the nonmoving party’s] favor,” *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999). Applying that standard, and assuming that Plaintiffs did not actually intend to argue for the expansion of the loan forgiveness program to include them in any comment process, Plaintiffs would even more clearly have lost only “a procedural right *in vacuo*,” unrelated to any concrete interest, and indistinguishable from the abstract right of any person to comment on government policies. *Summers*, 555 U.S. at 496; cf. *Scenic Am., Inc. v. U.S. Dep’t of Transp.*, 836 F.3d 42, 53 (D.C. Cir. 2016) (“Scenic’s lack of any evidentiary basis for its redressability contentions requires us to reject its standing as to its notice-and-comment claim.”). By depriving Defendants of the opportunity to contest Plaintiffs’ asserted basis for standing, the Court’s decision to advance this case to final judgment prejudiced Defendants.

Advancing this case to final judgment also resulted in the Court rendering a final decision on the merits before the administrative record could be filed. Under the APA, “judicial review is based upon the full administrative record that was before the Secretary at the time he made his decision,” *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), so that too was error. See *Paris v. U.S. Dep’t of Hous. & Urb. Dev.*, 713 F.2d 1341, 1346 (7th Cir. 1983) (“[T]he data upon which HUD relied in reaching the conclusions contained in its disposition recommendation are apparently still scattered in files throughout the HUD area office. These facts provide ample evidence of prejudice in a case involving review under the Administrative Procedure Act . . .”). And contrary to the Court’s findings, see Order at 8–10, the administrative record was not necessarily immaterial to the outcome of this case, as it might have informed the Court’s decision as to the appropriate remedy. But because the Court closed these proceedings prematurely, Defendants were unable to litigate this case on the basis of a full record, and the Court entered a decision based on the “APA’s substantive requirements” without reviewing the agency record that forms the basis for APA review.

## II. The Balance of Equities Overwhelmingly Favors a Stay Pending Appeal.

The remaining stay factors also tilt decisively in favor of the government.

While leaving Plaintiffs in the same place with respect to their notice-and-comment rights, and making Plaintiff Taylor worse off to the tune of \$10,000, the Court’s judgment will impair the government’s and the public’s interest in mitigating financial harm to millions of federal student loan borrowers at the very moment that relief is needed. The Fifth Circuit has recognized that “[j]udicial interference with a government agency’s policies often constitutes irreparable injury.” *Texas v. United States*, 14 F.4th 332, 340 (5th Cir. 2021), (citing *Valentine v. Collier*, 956 F.3d 797, 803 (5th Cir. 2020)), *opinion vacated on reh’g en banc*, 24 F.4th 407 (5th Cir. 2021). That is certainly so in this case, where Congress provided the Secretary, via clear statutory text, with significant discretion to act quickly, to craft appropriate relief, and to dispense with certain formal procedures that might otherwise be required, and yet the relief the Secretary deemed to be necessary has been put on hold by court order. The Secretary concluded, based on evidence unrebutted by Plaintiffs or the Court, that millions of federal student loan borrowers will be at a heightened risk of delinquency and default on their student-loan obligations when the current payment pause ends. These risks are severe, *see* Kvaal Decl. ¶ 6(c), App’x 3, and the consequences of default can be wide ranging and include wage garnishment, damage to borrowers’ credit reports, and the withholding of federal benefits. FSA, *Student Loan Delinquency and Default*, <https://perma.cc/9RJ7-SXR2>. The Secretary thus found that a measure of loan discharge would be appropriate to help guard student loan borrowers against those risks and assist them in recovering from the financial harm caused by the COVID-19 pandemic. Whatever parochial interests of Plaintiffs might be protected by the Court’s judgment, they pale in comparison to the interests of millions of student loan borrowers who face an imminent shift into repayment and need relief now. *See Golden Gate Rest. Ass’n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1126–27 (9th Cir. 2008)

(“[O]ur consideration of the public interest is constrained in this case, for the responsible public officials . . . have already considered that interest”).

The judgment also inflicts irreparable harm on Defendants by putting them to a perilous and unnecessary choice: restarting payments as previously planned—and thereby inviting the very cascade of delinquencies and defaults that prompted the Secretary to adopt the loan discharge program in the first place—or considering other options, which would impose their own costs. For instance, extending the pause on payments would cost the government several billion dollars per month in forborne payments from borrowers. Kvaal Decl. ¶ 9, App’x 5. Because the loan-discharge program is just one piece of the Secretary’s comprehensive effort to help student-loan borrowers emerge from the pandemic without serious financial harm with respect to their federal debts, prolonged uncertainty over the propriety of the loan discharge program may undermine the Secretary’s efforts to provide borrowers with the full benefit of those other actions.

Moreover, the public and potentially millions of individual borrowers will be harmed by the uncertainty and instability that is sure to ensue following this Court’s judgment. During the time the student loan relief application was open, approximately 26 million borrowers applied for debt relief, and the Department approved 16 million of those applications. *See id.* ¶ 5, App’x 2. As the appellate process drags on, as it might, these borrowers will be left with significant financial uncertainty. That is particularly true of the approximately 18 million borrowers who were slated to have their federal loans forgiven in their entirety, and who already may have acted in reliance on that expected relief. *See id.* ¶ 7(b), App’x 5.

Ultimately, it would be inequitable to inflict all these harms on the government, the public, and millions of individual student loan borrowers, particularly those most at risk of delinquency and default, only so that these two Plaintiffs can either be made similarly worse off (as to Plaintiff Taylor, *losing* \$10,000 in loan forgiveness) or be left entirely unaffected (as to both Plaintiffs, having no greater

opportunity to provide comments on the loan forgiveness program than before and, as to Plaintiff Brown, remaining precluded from loan forgiveness under the program). That is all the more true here, where assisting Plaintiffs is not mutually exclusive with providing relief to millions of at-risk student-loan borrowers: the Department of Education is still reviewing other means by which it could provide student loan relief to other borrowers including Plaintiff Brown. U.S. Dep’t of Educ., FSA, *One-Time Federal Student Loan Debt Relief—Are Federal Family Education Loan (FFEL) Program Loans or Perkins Loans Eligible for Debt Relief?*, <https://perma.cc/XS4H-GS6Z> (“ED is assessing whether there are alternative pathways to provide relief to borrowers with federal student loans not held by ED, including FFEL Program loans and Perkins Loans, and is discussing this with private lenders.”). Vacatur of the forgiveness plan is thus wholly unnecessary to provide Plaintiffs possible relief.

### **III. At a Minimum, the Judgment Should Be Narrowed**

If the Court does not issue a full stay of its decision, it should at least narrow the scope of its order to address Plaintiffs’ injury alone. It is now a familiar observation that universal vacatur and nationwide injunctions “upset the bedrock practice of case-by-case judgments with respect to the parties in each case.” *Arizona v. Biden*, 31 F.4th 469, 484 (6th Cir. 2022) (Sutton, J., concurring). They “force judges into making rushed, high-stakes, low-information decisions,” and open up “a nearly boundless opportunity to shop for a friendly forum.” *DHS v. New York*, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring). Accordingly, courts should “thoroughly analyze the extent of relief necessary” before awarding an injunction or vacatur with nationwide effect. *Georgia*, 46 F.4th at 1306. As a general matter, “[a] plaintiff’s remedy must be tailored to redress the plaintiff’s particular injury,” *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018), and “no more burdensome to [Defendants] than necessary,” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994).

Granting universal relief here in the form of vacatur of the entire program is inconsistent with Article III and principles of equity. See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944) (concluding that

Congress enacted the APA against a background rule that statutory remedies should be construed in accordance with “traditions of equity practice.”). Plaintiffs apparently believe that the only relief that would remedy their claimed injury is a nationwide prohibition on even one federal student loan borrower receiving even one dollar of loan relief. Even if they could show that they are injured by the government’s provision of student loan discharges to others, however, they cannot, as a matter of equity, justify a universal order of vacatur that deprives millions of needed relief. To the extent that it proves difficult for the Court to craft a remedy targeted to these Plaintiffs’ claimed injuries, that would only underscore the failings in Plaintiffs’ theory of standing and irreparable harm.

### CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court stay its final judgment pending resolution of Defendants’ appeal.

Dated: November 15, 2022

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 15, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically serve a copy to all counsel of record.

/s/ Cody T. Knapp  
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